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No. 89-1884

In the Supreme Court of the United States

OCTOBER TERM, 1990

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary reasonably determined, in 45 C.F.R. 304.50(b), that interest earned by a State on child support payments collected with federal financial help constitutes "other income resulting from [child support enforcement] services" under 42 U.S.C. 655(a)(1).

2. Whether 45 C.F.R. 304.50(b) conflicts with the Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6503(a).

3. Whether the Secretary's interpretation of 42 U.S.C. 655(a)(1) applies "retroactively."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 898 F.2d 147 (Table). The opinion of the district court (Pet. App. 7a-27a) is unreported. The opinion of the Departmental Grant Appeals Board (Pet. App. 28a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1990. A petition for a writ of certiorari was filed on May 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title IV-D of the Social Security Act, 42 U.S.C. 651 *et seq.*, established the federal Child Support Enforcement Program to enforce child and spousal support obligations, including those owed by absent parents to their children who are receiving Aid to Families with Dependent Children (AFDC). Under the Program, each participating State must submit a plan for child support enforcement to the Secretary of Health and Human Services (HHS) for review and approval. 42 U.S.C. 652(a)(3), 654. The statute provides for federal financial participation equal to specific percentages of "amounts expended by [the] State * * * for the operation of the plan approved under [42 U.S.C. 654]." 42 U.S.C. 655(a)(1)(A).

Section 455(a) of the Social Security Act, as amended by Section 2333(c) of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 863, 42 U.S.C. 655(a), limits the amount of federal financial participation based on the availability of other sources of program funding. The Act provides in pertinent part:

> In determining the total amounts expended by any State during a quarter * * * there shall be excluded an amount equal to the total of any fees collected or other income resulting from services provided under the [Title IV-D State] plan * * *.

42 U.S.C. 655(a)(1).[1]

In 1984, the Secretary promulgated regulations applying this requirement to interest earned on a percentage of state

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[1] In addition, the Act authorizes the Secretary to adjust later payments to States for overpayments of federal funds made in earlier fiscal quarters. 42 U.S.C. 655(b)(2). These adjustments flow from periodic audits. 42 U.S.C. 652(a)(4). Pursuant to this authority, the Secretary has promulgated federal regulations providing for audits of the Program. 42 C.F.R. Pt. 305.

child support collections equivalent to the percentage of federal financial support for the Program. Thus, 45 C.F.R. 304.50 provides in pertinent part (emphasis added):

> The IV-D agency must exclude from its quarterly expenditure claims an amount equal to:
>
> * * * * *
>
> (b) All *interest* and other income earned during the quarter resulting from services provided under the IV-D State plan.[2]

2. On November 24, 1986, HHS's Office of Child Support Enforcement (OCSE), which administers the Program, audited the interest earned by petitioner on child support collections for the period October 1, 1981, through June 30, 1986. It found that interest earned for the period of the audit totalled $1,110.571.59 and that $777,746 of that portion should have been returned to the federal government as its share of the earned interest. Pet. App. 8a, 28a. The OCSE disallowed this share from the amount due petitioner in federal financial participation under the Program. Petitioner requested review by OCSE's Director, who affirmed the disallowance. Petitioner then appealed to HHS's Departmental Grant Appeals Board, which also affirmed the disallowance. Pet. App. 28a-38a.

Petitioner then filed this action for review in federal district court. The court, in an order dated April 8, 1988, granted preliminary relief, but stayed the proceedings pending disposition of a parallel petition for review filed in the court of appeals.[3] When the court resumed its

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[2] Action Transmittal 82-8, issued by the Office of Child Support Enforcement on September 3, 1982, contained a substantially identical provision.

[3] Because of the possibility that the appellate court rather than the district court would have jurisdiction pursuant to 42 U.S.C. 1316(a)(3), petitioner had simultaneously filed a petition with the court of appeals

proceedings, on July 14, 1989, it granted summary judgment in favor of the Secretary. Pet. App. 7a-20a.

The court first determined that Section 655(a)(1)'s exclusion from state spending totals of "any fees collected or other income resulting from services" provided under the child support enforcement plan included interest earned on collected payments because interest is "ordinarily considered" to be income.[4] Further, the income "result[ed] from the program" because without the federal program, the State would not have had the money to invest. Pet. App. 12a.

The court next rejected the contention that Section 655(a)(1) applied only to fee income earned from non-AFDC services and thus did not apply here because the interest at issue derived from both AFDC and non-AFDC services. Pet. App. 12a-13a. The court adopted the government's reasoning that since the statute "applie[d] both to 'fees' collected from non-AFDC clients and 'other income,' " it should be read to include income due to AFDC services in order to avoid rendering meaningless the "other income" language. The court further noted that the provision at issue was separately codified under Section 655, while the rest of the enactment (Section 2333, 95 Stat. 862-863), which deals generally with fees for non-AFDC participants, was codified under Section 654. In the court's view, the separate codification supported the conclusion that Section 655(a)(1) is not limited in application to income from non-AFDC services. Pet. App. 13a-14a.

The court then turned to petitioner's contention that the State was expressly allowed to keep the interest by the

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raising the identical issue. The court of appeals ruled that it lacked jurisdiction directly to review the Appeals Board's decision. *South Carolina Dep't of Social Servs. v. Bowen*, 866 F.2d 93 (4th Cir. 1989).

[4] The district court erroneously identified Section 655(a)(1) as 42 U.S.C. 655(a)(2) throughout its opinion.

Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6503(a), which provides that "[a] State is not accountable for interest earned on grant money pending its disbursement for program purposes." Petitioner had argued that the federal share of child support collections functioned as AFDC "grant-in-aid funds" because the State generally retained that share, crediting it towards federal AFDC grant monies due the State. See Pet. App. 14a.

Quoting from the balance of Section 6503(a), the court noted that the Act was "intended to reduce the amount of interest that states may earn on federal grant-in-aid funds" by minimizing the time between federal transfer and state disbursement of funds. Petitioner's interpretation was unsatisfactory since it "would increase, rather than decrease, the state's opportunity to earn interest on federal funds" in contravention of this purpose. Pet. App. 15a-16a. Second, the court concluded that substituted funds did not come within the definition of "grant" in the Cooperation Act as "money * * * that is *paid or provided* by the United States Government under a fixed annual or total authorization, to a State." 31 U.S.C. 6501(4)(A) (emphasis added). As the court pointed out, the federal government could normally control the timing of a transfer of funds to a State and thus maximize the amount of interest earned; it lost its ability to do so "[w]hen a state already has the funds for disbursement in its control and uses these to offset funds that the federal government would otherwise have 'paid or provided' to the state." Pet. App. 16a-17a.

Finally, the court determined that Section 655(a)(1), as interpreted in 45 C.F.R. 304.50, could be applied to petitioner from October 1, 1981, the effective date of the relevant language in Section 655(a)(1). That application would not be impermissibly retroactive because "[w]hen HHS later promulgated the regulation [in 1984] * * * it merely clarified the statute; it did not change the statute's meaning."

Pet. App. 18a. Relying on this Court's decision in *Manhattan Gen. Equip. Co.* v. *Commissioner*, 297 U.S. 129 (1936), the court therefore concluded that this was not a problematic "retroactive change of settled law." Pet. App. 17a-18a.[5]

5. In a *per curiam* unpublished opinion, the court of appeals affirmed. Pet. App. 1a-3a. The court noted that the sole error in the district court's opinion was that it had applied "an incorrect ['arbitrary' and 'capricious'] standard of review to the Secretary's interpretation of 42 U.S.C. 655(a)" since, under this Court's opinion in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), "[t]he Secretary's interpretation, as manifested in the regulation he has promulgated, must stand as long as it is reasonable." Pet. App. 3a. The court of appeals then concluded that 45 C.F.R. 304.50 is "a reasonable interpretation of [the statute], that it does not constitute a retroactive application of the statute, and that it is consistent with the Intergovernmental Cooperation Act" for the reasons stated by the district court. Pet. App. 3a.

ARGUMENT

Petitioner seeks review of an unpublished (and therefore non-binding[6]) *per curiam* decision on an issue that has yet to be addressed by any other circuit. Moreover, the deci-

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[5] The court also concluded that, even if it believed that the regulation warranted retroactivity analysis, it would find that the regulation should apply because "the balance of harm does not preponderate for or against any party—one or the other is going to suffer the loss of the same amount of money." Pet. App. 17a-18a.

In addition, the court declined to attach any significance to the fact that prior OCSE audits had not objected to interest retention by the State before, noting that petitioner had not shown that it justifiably relied on the results of the audits. Pet. App. 19a n.3.

[6] Pet. App. 2a; see 4th Cir. I.O.P. 36.4, 36.5.

sion below is correct and is not in conflict with any decision of this Court. Further review is therefore unwarranted.

1. As the court below noted (Pet. App. 3a), the Secretary's interpretation of the statute must prevail if it is reasonable. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Here, his interpretation—that Section 655(a)(1) applies to interest earned on child support collections—follows naturally from the statutory language. The Section provides that petitioner must deduct "other income resulting from services provided under the [Title IV-D] plan." It is undeniable that the concept of "income" encompasses interest. Further, the interest here clearly "resulted" from child support enforcement services since, as the Secretary, the district court, and the court of appeals recognized, petitioner's treasurer "would not have the money to invest without the federal program." Pet. App. 12a.[7]

Moreover, the Secretary's interpretation furthers the statutory purpose. Petitioner claims it may invest child support payments collected with federal help, use the interest for general state purposes, and incur no proportional offset in federal enforcement aid. This, of course, substantially inflates petitioner's apparent need for such federal funds. But federal help for child support enforcement was designed to enhance child support collections and thus reduce the need for federal AFDC expenditures, not to provide windfall profits for the States. It is therefore only reasonable to expect that such income will be counted in determining state need for further federal assistance.

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[7] The fact that in theory either petitioner or its state treasurer could have held these funds rather than invested them is irrelevant. In the district court's words, petitioner's "internal investment decisions cannot determine the correct construction of a federal statute." Pet. App. 12a.

Petitioner argues (Pet. 11) that Section 655(a)(1)'s exclusion refers only to costs and fees for child support services obtained from non-AFDC families, the only clients required to pay for child support services. Under this interpretation, "other income" could mean only non-AFDC "costs in excess of the fees," which the States may collect under Section 654(6)(E).[8] See Pet. 14. But the provision for collecting these "costs" was only enacted in 1982. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 171(a)(3), 96 Stat. 401. Section 655(a)(1) was amended to refer to "any fees collected or other income resulting from services" in 1981. § 2333(c), 95 Stat. 863. Petitioner's argument thus leaves the term "other income," as it was enacted in 1981, with no reasonable content.

Petitioner's reliance on the legislative history is also misplaced. Pet. 11-14. That history demonstrates only that, as the title of the 1981 legislation suggests, the principal thrust of the legislation was to deal with the "Cost of Collection and Other Services for Non-AFDC Families." § 2333, 95 Stat. 862-863. But while the remainder of the legislation was codified in 42 U.S.C. 654, the "other income" language was codified under 42 U.S.C. 655, broadly relating to "Payments to States." This separate codification supports the Secretary's reading of the statute's language.[9]

[8] Section 654(6)(D) was redesignated as Section 654(6)(E) by the Family Support Act of 1988, Pub. L. No. 100-485, Tit. I, § 111(c), 102 Stat. 2349.

[9] Petitioner also relies on the fact that the original proposed HHS Regulation, 42 C.F.R. 304.50, which restated Section 655's language, evoked a comment from an individual who suggested that this language could be construed as not including interest income, and that HHS responded that it "agree[d] that interest income could *possibly* be construed as exempt from the proposed [regulation]. Therefore, we revised the final [regulation]." Pet. 15-16 (emphasis added). As the district court observed (Pet. App. 19a n.3), however, all this shows is HHS's recognition "that the statute may be read in more than one way."

2. Petitioner's contention that the Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6503 (p. 5, *supra*), shelters its investment earnings is also without merit.[10] Under this view, a percentage of state child support collections (which the State collects with federal help) itself becomes a "grant" because federal AFDC grants are reduced by that percentage. But, as the district court and court of appeals held, the Act is far more straightforward: it defines "grants" as amounts "paid or provided" by the United States under a fixed annual or total authorization.[11] 31 U.S.C. 6501(4)(A); see, *e.g.*, *North Carolina* v. *Heckler*, 584 F.Supp. 179, 185-186 (E.D.N.C. 1984). Funds from non-federal sources, such as a parent's payment of child support, do not become federal funds just because the government accounts for them in determining the level of federal grants. As the district court pointed out (Pet. App. 17a), the federal government does not control transfer of such funds. Since the government therefore cannot maximize the interest earnings on those funds, they are unlike the "grants" that are the subject of the Act. See 31 U.S.C. 6503(a). Thus, petitioner's construction would create a large and continuing windfall to the States, an end the Act sought to avoid. See H.R. Rep. No. 1845, 90th Cong., 2d Sess. 9 (1968).

3. Finally, there is no basis for petitioner to resist the recovery of interest for the period subsequent to October 1,

[10] Petitioner did not present its Intergovernmental Cooperation Act argument to the Grant Appeals Board. Therefore, it is at least doubtful whether it was entitled to raise it subsequently. See, *e.g.*, *Senn Trucking Co.* v. *ICC*, 560 F.2d 1179, 1182 (4th Cir. 1977).

[11] To the extent that the word "provided" has a meaning independent of "paid," it most likely refers to cases where federal money is transmitted to a state through an intermediary, such as the Corporation for Public Broadcasting. See 47 U.S.C. 396(g)(2)(B) (authorizing the Corporation to "make grants to public telecommunications entities, national, regional, and other systems of public telecommunications entities").

1981 (the effective date of the amendment to Section 655(a)(1) at issue here), but prior to September 19, 1984 (when the regulation was promulgated). As the district court and court of appeals recognized (see Pet. App. 18a-19a), the regulation raises no significant issue of retroactivity. The regulation is not legislative in character; rather, it simply interprets a preexisting statutory requirement and thus, "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand." *Manhattan Gen. Equip. Co.* v. *Commissioner*, 297 U.S. 129, 135 (1936); K. Davis, *Administrative Law Text* § 5.05, at 135 (3d ed. 1972).[12]

"[T]he fact that the first [SC-82-AC, dated November 17, 1983] and third [SC-84-PR, dated June 17, 1986] of three audits done by the Secretary during the period in question made no mention of DSS's not excluding the interest on the collections" (Pet. 22-23) does not demonstrate agency "inconsistency" (Pet. 23) or buttress petitioner's retroactivity claim.[13] The failure of the audits to address the matter of interest does not establish the existence of any settled standard authorizing the State to keep such interest for its own purposes. In fact, the statute specifically contemplates that

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[12] Petitioner has not claimed that the regulation disturbed any prior settled interpretation. In fact, as early as September 3, 1982, an OCSE Action Transmittal (82-8) to the States specifically articulated the interest income requirement. And when the regulation embodying the requirement was proposed, it did not evoke any widespread protests as one might expect if a settled rule were being significantly altered. Only one State, apparently not petitioner, objected that the regulation was inconsistent with the statute. See 49 Fed. Reg. 36,771 (1984).

[13] In fact, the issue was raised in audit report number SC-83-PM, dated August 10, 1984. The last of the three reports (SC-84-PR, June 17, 1986) referred back to still unresolved problems in connection with the second report.

the Secretary will make readjustments with respect to the payments made in prior quarters. 42 U.S.C. 655(b)(2).[14]

Nor can petitioner establish what amounts to an estoppel claim against the United States. This Court has recently confirmed that the Executive Branch cannot be required to pay funds out of the Treasury—as would be required here were credit for the interest not forthcoming—without the statutory authorization mandated by the Appropriations Clause. *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465 (1990). In this case, the failure of government officials to identify a problem in an audit cannot increase the amount payable by the government pursuant to law.

In any event, as the district court and court of appeals also determined (see Pet. App. 19a n.3), petitioner cannot show that it justifiably relied on the audits. And, even if it did so rely, its reliance was not detrimental. Rather, petitioner has long enjoyed the benefits of the interest income it accumulated between 1981 and 1986. Estoppel is not an available remedy for such a boon. See *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 61-63 (1984).

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[14] In any case, both courts below concluded that, even if it were appropriate to apply retroactivity analysis in this case, the regulation could be applied to petitioner. As the district court put it, "the balance of harm does not preponderate for or against any party" since "one or the other is going to suffer the loss of the same amount of money." Pet. App. 18a.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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